

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 55 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL  
and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No
  2. To be referred to the Reporter or not? No
  3. Whether Their Lordships wish to see the fair copy  
of the judgement? No
  4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No
  5. Whether it is to be circulated to the Civil Judge?  
No
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STATE OF GUJARAT

Versus

HAMID HAJI KER

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Appearance:

MR. SR DIVETIA, A.P.P. for the State-appellant.

NOTICE SERVED for Respondent No. 1

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 09/04/99

ORAL JUDGEMENT

(Per : Panchal, J.)

The acquittal of the respondent recorded by the  
learned Additional Sessions Judge, Jamnagar, in Sessions

Case No. 9 of 1988 vide judgment and order dated September 13, 1991 of the offences punishable under sections 452 & 302 of the Indian Penal Code is challenged by the State Government in the present appeal, which is filed under section 378 of the Code of Criminal Procedure, 1973.

2. The prosecution case is that deceased Kulsumben, daughter of Harun Ibrahim, aged about 20 years was residing with her grand mother at village Salaya, Taluka : Khambhaliya, District : Jamnagar. The respondent at the relevant time was residing in the adjoining house. According to the prosecution, the respondent was quarrelling with the deceased, as the respondent had suspicion that the deceased was passing on chits containing messages from other persons to his wife and his wife would become of immoral character. According to the prosecution, because of entertainment of such suspicion, respondent on September 22, 1987 at about 2.00 P.M. in the noon sprinkled kerosene on the deceased who was sleeping and set her on fire. One Gulshan Jusab residing nearby, noticed smoke emanating from the house where the deceased was residing and, therefore, he tried to open the door on the ground floor. However, door on the ground floor was found locked from inside and, therefore, Gulshan climbed roof of the house of the deceased and tried to enter the house from the door on the first floor which was also found closed, as a result he broke open the door by giving kicks and found that the deceased was aflame. He, therefore, came down on the ground floor, opened the door and went to the place where Jinnatbai Harunbhai - mother of the deceased was residing. He informed the mother of the deceased that deceased had received burn injuries, as a result of which witness Jinnatbai and others went to the place where the incident had taken place. Witness Jinnatbai found the deceased in a pitiable condition and with the help of others, removed her to Khambhaliya Referral Hospital. It is the case of the prosecution that head constable Ramdas Jerambhai Sudane, who was P.S.O. of Khambhaliya Police Station, recorded complaint of Kulsumben as narrated by her wherein according to the head constable the deceased stated that she was set ablaze by the respondent, as the respondent had suspicion that she was giving chits written by other persons to his wife. The complaint recorded was forwarded to Khambhaliya Police Station for registration. Initially, the offence punishable under section 307 I.P.C. was registered against the respondent, but during treatment the deceased expired at about 5.15 P.M. and, therefore, offence punishable under section 302 I.P.C. was added. Thereafter inquest was

held on the dead body and dead body was sent to Dr. Bhanuben Keshavlal Badani for postmortem examination. The doctor performed autopsy on the dead body, after which statements of witnesses who were found conversant with the facts of the case, were recorded. At the conclusion of investigation, the respondent was chargesheeted for the offences punishable under section 302 read with section 452 of I.P.C. The offence under section 302 I.P.C. is exclusively triable by a Court of Sessions and, therefore, the case was committed to Sessions Court where it was numbered as Sessions Case No. 9 of 1988. The learned Additional Sessions Judge, Jamnagar framed charge against the accused at Exh.2 for the offences punishable under sections 452 & 302 I.P.C. The charge was read over and explained to the respondent, who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution examined, (1) Dr. B.K. Badani, PW 1, Exh.6, (2) Tejiben Derajbhai, PW 2 Exh.10, (3) Mohanbhai Khimjibhai, PW 3 Exh.11, (4) Aminaben Valimohmad, PW 4 Exh.12, (5) Jagabhai Dadabhai, PW 5, Exh.14, (6) Jenamben Gulsan, PW 6, Exh.15, (7) Gulsan Jusab, PW 7, Exh.16, (8) Jinnatben Harunbhai, PW 8 Exh.17, (9) Janbhai Ibrahim, PW.9 Exh.18, (10) Karimbhai Daudbhai, PW 10, Exh.19, (11) Osmanbhai Kasambhai, PW 11, Exh.20, (12) Abubhai Ishabhai, PW 12, Exh.21, (13) Ramdas Jerambhai Sudane, PW 13, Exh.22, (14) Anopsinh Harisinh, PW 14, Exh.35, and (15) Pradumansinh V.Gohil, PW 15, Exh.37, to prove its case against the respondent. The prosecution also produced postmortem notes at Exh.8, F.I.R. given by the deceased at Exh.23, inquest panchnama at Exh.28, panchnama of place of occurrence at Exh.36 etc. in support of its case against the respondent. After recording of evidence of witnesses for prosecution was over, the learned Judge questioned the respondent generally on the case and recorded his statement under section 313 of the Code of Criminal Procedure, 1973. In his statement, the respondent denied the case of the prosecution, but did not lead any evidence in his defence. On appreciation of medical evidence as well as evidence of mother of the deceased, the learned Judge concluded that the deceased was all throughtout unconscious and was not in a position to make any statement to any one. The learned Judge further deduced that the so-called complaint given by the deceased was a concocted piece of evidence and the respondent was falsely implicated in the case. In view of these conclusions, the learned Judge acquitted the respondent by the impugned judgment, giving rise to the present appeal.

3. Mr. S.R.Divetia, learned A.P.P. submitted that

the evidence of head constable Ramdas Jerambhai indicates that he had recorded complaint of the deceased as narrated by her when she was conscious and, therefore, the respondent ought to have been convicted of the offences punishable under sections 452 & 302 of the Indian Penal Code. The learned Counsel highlighted that the dying declaration of the deceased which was initially recorded as her complaint, is supported by other evidence on record and, therefore, the appeal should be accepted.

4. We may state that though the respondent is duly served, he has not appeared either in person or through an advocate.

5. We have been taken through the entire evidence on record by the learned Additional Public Prosecutor. The evidence of Dr. Bhanuben Keshavlal Badani shows that the deceased was admitted to Khambhaliya Referral Hospital at about 4.15 P.M. and she had treated the deceased. The doctor testified before the Court that the deceased had sustained 100% deep burns all over her body. According to her, deceased had murmured something which she was not able to understand and, therefore, she had gathered history of the incident from maternal uncle of the deceased, who had brought the deceased to the Hospital. She produced medical papers pertaining to treatment given to the deceased at Exh.7. In her cross-examination, the doctor admitted that because of deep burns sustained by the deceased, lumps of flesh, muscles, skin, bones were destroyed and even nervous system had also failed. The doctor clearly stated in her cross-examination that in case of 100% deep burns, the victim would be in shock as well as in great pain and would be semi-conscious. The doctor informed the Court that when the deceased was admitted in the hospital, she had sustained 100% burns. The doctor clarified that at about 5.00 P.M. the deceased was gasping for air and it was not possible to feel her pulse nor her blood pressure was recordable. According to the doctor, right from the time of admission of the deceased into the hospital, physical condition of the deceased was deteriorating gradually till she expired. The doctor stated in her deposition that the deceased was not "oriented", meaning thereby her mental condition was not good and her speech was incoherent. The doctor during her cross-examination categorically stated that she was of the opinion that the deceased was not in a position to make any statement to any one right from her admission to the hospital till she expired. She also claimed that the deceased could not have put thumb mark on any document and no police officer had seen her during the course of treatment given to the deceased. The doctor categorically asserted in crossexamination

that no police officer had obtained any certificate from her to the effect that the deceased was in fit state of mind to make statement, nor she had made any endorsement on the so-called complaint which was recorded by head constable Ramdas Jerambhai. Exh.7 which are medical papers indicate that at 5.15 P.M., no pulse of the deceased was felt and her respiratory system had failed, as a result of which, she was declared dead by the doctor. Though head constable Ramdas Jerambhai has stated in his evidence that he had gone to the hospital and recorded complaint of the deceased as narrated by her, his evidence does not inspire any confidence at all. He claimed in his evidence that he had obtained endorsement of the doctor who was treating the deceased to the effect that the deceased was conscious and in fit state of mind to make statement, but this assertion stands contradicted by the evidence of doctor whose evidence is supported by the medical papers on record. We have carefully examined Exh.23, which is so-called complaint recorded by witness Ramdas Jerambhai, but there is no endorsement on it made by any medical officer to the effect that the deceased was conscious and was in fit state of mind to make statement. The evidence of head constable Ramdas suffers from several major discrepancies and the same is rightly disbelieved by the learned Judge, who had advantage of observing demeanour of the said witness. Moreover, the evidence of head constable Ramdas stands completely contradicted by the deposition of Jinnatben Harunbhai who was mother of the deceased. Witness Jinnatben in her deposition has clearly stated that when she went to the place where the incident had taken place, she found that the deceased was unconscious and she was unconscious all throughout till she died. The mother of the deceased has in terms stated in her cross-examination that after the deceased was declared dead, her brother i.e. maternal uncle of the deceased, had gone to inform the police and thereupon head constable Ramdas Jerambhai had gone to the hospital. What is shocking is that according to witness Jinnatben, head constable Ramdas Jerambhai had obtained thumb impression of the deceased on the so-called complaint after she was declared dead by the doctor. It may be stated that Jinnatben, mother of deceased is a prosecution witness and she is not declared hostile at all. Further evidence of Jenamben Gulshan read with evidence of Gulshan Jusab establishes beyond reasonable doubt that at the time of incident, no one and more particularly, the respondent was present at all. As per the evidence of Jenamben, deceased had gone to first floor of her house on the pretext of taking bath, but within short time, smoke emanating from the house was

noticed, as a result of which, her husband Gulshan had tried to open the door situated on the ground floor, but as it was found locked from inside, her husband had climbed the roof of the house and thereafter by giving kicks, had broken open the door on the first floor. The panchnama of the place of occurrence shows that there are only two doors and the evidence of these two witnesses proves that both the doors were closed from inside. Therefore, prosecution story that the respondent came to the place where deceased was sleeping and after pouring kerosene over her body, set her ablaze, becomes not only doubtful, but false one. In fact, except the so-called dying declaration of the deceased, prosecution has not led any evidence to bring home guilt to the accused. On the totality of the facts and circumstances of the case, we are of the opinion that the finding recorded by the learned Additional Sessions Judge that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, the respondent should be acquitted, is eminently just and no case is made out by the appellant to interfere with the same in the present appeal.

6. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) *Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhary*, A.I.R. 1967 S.C. 1124, and (2) *State of Karnataka v. Hema Reddy and another*, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince us to take the view contrary to the one already taken by the learned Judge and therefore, the appeal is liable to be rejected.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

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